United States Supreme Court

OCTOBER TERM, 1905.

No. 269.

PEORIA GAS AND ELECTRIC COMPANY,
Appellant,

vs.

CITY OF PEORIA,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.

STATEMENT.

This case arises on a bill filed by appellant to restrain appellee from enforcing an ordinance fixing a maximum rate of 75 cents per thousand cubic feet to be charged the consumers of gas within the City of Peoria and also prescribing a penalty for each violation of the ordinance.

Prior to 1899, for a period of nearly fifty years, the Peoria Gas Light and Coke Company, organized under a special charter, had manufactured and furnished gas to the City of Peoria and its citizens.

Mathew Henebery became connected with this old company some time about 1875. (Rec. p. 1218.) At that

time it was $60,000.00 in debt. The management which then took hold made a highly prosperous company of it.

Out of the receipts this debt was soon paid. Additional real estate was bought at $6,000.00 or $7,000.00. A water gas plant was installed at $80,000.00. A retort house and other betterments were built at an expense of $60,000.00. The company also purchased $55,000.00 of the $100,000.00 of the shares of the capital stock of the General Electric Company, which at that time furnished the electric lights, public and private, of the city. They also loaned $50,000.00 of their surplus and, in addition to all this, paid annual dividends of ten per cent. and, in addition thereto, annual salaries to the officers of $5,000.00, $3,000.00 and $1,000.00.

When Henebery quit, in April, 1900, this old company had a surplus of $80,000.00, and he sold his stock, which was $50.00 per share on its face, at $218.35 per share.

This company, when he first became connected with it, was selling gas at $3.50 per thousand cubic feet. This was reduced in a short time to $2.50. This rate prevailed for a short time and then it was reduced to $2.00 and then it was reduced to $1.25 net for light and 75 cents net for fuel gas. This had been in force some time when Henebery sold out. These reductions were all voluntary.

There was still another reduction by this company to $1.00 for light and 75 cents for fuel about the time the new company obtained its charter, in the spring of 1899.

At that time the consumption of gas for fuel and light

was about equal, making the average price at which the old company was manufacturing and selling gas 87½ cents per thousand cubic feet. (Rec. p. 1218, *et seq.*)

So enormous had been the profits of this old company that the citizens of Peoria were ready to encourage the organization of a new company.

Theodore J. Miller and Sumner R. Clarke, of the City of Peoria, and John R. Walsh, of the City of Chicago, recognizing the situation as a favorable one to obtain an advantageous concession from the City of Peoria, took steps to promote the organization of a new company.

John R. Walsh's connection with the enterprise was carefully concealed by the local promoters and several local capitalists and business men were induced to become subscribers to the stock by representations on the part of the local promoters that it was to be a competitive company with the old, and that it was to be a Peoria enterprise and would result in furnishing gas to Peoria citizens at very much reduced rates.

The stock was, in fact, all subscribed for by Peoria parties, Sumner R. Clarke subscribing for much the largest amount thereof. Application was then made to the City Council for an ordinance permitting the new company, which was first incorporated as the Peoples Gas and Electric Company, to erect a plant and occupy streets and alleys for the purpose of laying mains thereon.

To obtain the passage of this ordinance, the promoters and stockholders of the new company interviewed the

aldermen and represented to them that it was a Peoria company and a Peoria enterprise and that granting it the license asked would result in furnishing gas at a much lower rate than the old company were demanding, and in some instances saying that it could and would be furnished at 75 cents per thousand; and in other instances, as confirmatory of the above statement, repeating that the officers of the old company had declared they would put the price of gas down to 50 cents if the new company attempted to go ahead with its enterprise.

Persuaded and induced by these statements, an ordinance was passed in April, 1899, by the City Council of Peoria, permitting the Peoples Gas and Electric Company to construct and operate and maintain gas works in the City of Peoria and lay mains on streets and alleys for distribution, etc.

It was understood, as Mr. Clarke says, that Peoria parties would take one-third of the stock and Mr. Walsh the rest. This, however, was known only to Mr. Clarke and Mr. Miller.

But one assessment (twenty per cent.) was made on the $500,000.00 of the capital stock and no more was ever paid in by the subscribers. This assessment was afterwards repaid to the Peoria subscribers with interest. (Rec. pp. 1407, 1408, 1459.)

In pursuance of this same covert plan of the organization, as conceived by the promoters, Miller, Clarke and Walsh, soon after the passage of the ordinance giving the right to commence operations, Clarke, on January 2d, 1900,

assigned a large block of the stock to Walsh—3,040 shares, and another block of 750 shares to Little. (Rec. p. 1608.)

To make things doubly sure, all the local directors were asked to resign, and confidants of Walsh elected in their places. To assure the continuance of Walsh's exclusive control of the gas business, Mr. Little says it was understood when he, Little, became interested in the company that all the stock should be held as a unit and a continuity of the management be preserved during a period of years. (Rec. p. 1405.) In pursuance of this understanding, nearly all the stock of the company was placed in the hands of Sumner R. Clarke and John R. Walsh as trustees and to be held by them and voted by them as per a certain agreement likewise signed by the stockholders and held by the Equitable Trust Company of Chicago, but which the Master refused to permit defendants to inspect or put in evidence. (Rec. p. 1563.)

Mr. John R. Walsh through these agencies and by these methods had thus become master of a most favorable contract and privilege from the City.

In May, 1900, the new company increased its capital stock to the sum of one million dollars. The original stock being for $500,000.00, this increase amounted to $500,000.00. (Rec. p. 1611.)

The stockholders and directors regarded the rights and privileges which they had obtained under the ordinance from the City of such value that they, by resolution of record, declared the assets of the company of value equal to the increased amount of this capital stock, and directed

that it all be issued as paid-up stock to the then stockholders in proportion to their then holdings. (Rec. p. 1613.)

The new company's name was changed to the Peoria Gas and Electric Company. Its capital stock was increased to two millions. It erected a large and commodious plant for a city the size of Peoria, laid its mains and service pipes, and with about two thousand customers commenced operations about March 11th, 1900. The price from March 11th to March 21, 1900, was 90 cents net for light and 65 cents net for fuel gas.

The old company had lowered its rate and the new company met the cut in price by a 30-cent rate for both light and fuel.

The former owners of the old company had now sold out their holdings and a new lot of men were in control of that company. (Rec. p. 1224.)

W. B. McKinley, of Champaign, Illinois, a general operator in gas plants, became the president and practically the manager and director of the policy of the old company. There soon arose a friendly and intimate relation between these two competing companies.

Mr. Eustace, the superintendent of manufacture of the new company, was permitted to take that place for the old company, and their superintendent of distribution, Robb, for the time being became their superintendent of manufacture. (Rec. p. 1183.)

Eustace, while superintendent of the old company's

manufacture, maintained a confidential relation towards Little, the general manager of the new company.

The two companies soon arrived at the point where they wished and sought means to suppress the competition they were in, that they might raise and maintain a higher price to consumers.

They held a conference in Chicago for this very purpose. (Rec. p. 1350.) Mr. W. B. McKinley, the president of the old company, was there. Mr. Walsh was there. Mr. Little says when he came in, the statement was made that *the time had come to stop carrying on an unprofitable business, and the question arose as to what was fair and equitable rates, and the discussion was entirely on these lines.* He says Mr. McKinley had had experience and been identified with a number of gas plants for several years, but he didn't remember who suggested the rate, whether himself or Mr. McKinley. The general talk was on the advisability of making those rates, but he didn't remember who *made the suggestion of rates that were adopted.*

The rate adopted was $1.15 net for light and 75 cents net for fuel gas. (Rec. p. 1353.)

Immediately following this conference and the adoption of this rate, there appeared in the Peoria papers, at the same time, in exactly the same language, notices from each of the companies to the public of the adoption of this rate, to take effect on July 31st, 1900. (Rec. p. 1351, Rec. p. 26.)

Mr. Little says he caused the notice to be published

for the new company, but didn't know who did it for the old company, but further says he knew that the old company made the same rate at the same time; that he knew before he made this advance that the old company intended to do likewise.

In furtherance of this combination between these two competing companies to suppress that competition and raise the price of gas to the consumer a few months thereafter they, the two companies entered into a written agreement (Rec. pp. 1357-1468) by which the old company shut down its manufacturing plant and the new company connected up a service pipe with the old company's mains and furnished the old company gas at 75 cents per thousand. The old company, by its own employees, attended to the collection from its own customers and conducted its business as before except the manufacturing.

The new company made the repairs of mains, service pipes, etc., for the old company and charged them therefor.

By this arrangement, the old company no longer had it in its power to compete by reducing the price of gas to 75 cents. This arrangement was to continue for a period of ten years with the privilege of cancelling it on six months' notice by the old company any time within the first two years.

When the two companies united in raising and fixing the price of gas to $1.15 net for light and 75 cents net for fuel gas, the City took action to control the rate and in September, 1900, adopted an ordinance providing that the maximum price for gas furnished the citizens of Peoria and

all consumers of gas in said city should not exceed the sum of 75 cents per thousand cubic feet and that the gas so furnished should not be less than 18 candle power, to be measured at the place of consumption, etc., and that the Peoria Gas Light and Coke Company and the Peoria Gas and Electric Company or any other company, corporation or person who were then or might thereafter furnish gas to consumers in the City of Peoria were authorized and empowered to charge all consumers of gas in said city a sum not in excess of 75 cents per thousand cubic feet. This ordinance also provided a penalty of not less than $25.00 nor more than $200.00 for each violation thereof. (Rec. p. 17.)

After the adoption of the foregoing ordinance by the City, the complainant on the 18th of September, 1900, filed its bill in the United States Circuit Court charging that the City had no power or authority to enact the ordinance and charging and averring that the rate fixed by the City was unreasonable and that the ordinance was unreasonable and void, and prayed for and obtained an injunction against the City of Peoria and its officers from enforcing such ordinance during the pendency of the suit.

This bill the defendant answered averring and setting out certain false and fraudulent representations made by the promoters and stockholders of the complainant to the City Council of the defendant for the purpose of obtaining the passage of the ordinance, granting it the privilege of manufacturing and distributing gas in the City and averring that the promoters and stockholders of the complainant had, to obtain the passage of such ordinance, represented

that they would compete with the old company in the manufacture and sale of gas and could and would furnish it at 75 cents per thousand cubic feet and that they were, therefore, estopped to deny that such rate was reasonable.

The defendant also answered averring that it had authority to pass the ordinance fixing the rate and that the rate was reasonable and denying that the ordinance was unreasonable or void.

The defendant further answered that the question as to whether the State had delegated to the City its power and authority to regulate rates was not a federal one and that the complainants were estopped to assert a want of authority in the city to regulate the rate of charges to a consumer.

The defendant also answering alleged that prior to the enactment of the ordinance fixing the rate, that the complainant had entered into a combination, agreement or arrangement with the Peoria Gas Light and Coke Company to regulate or fix the price of gas to be sold to the citizens of the City of Peoria and that in pursuance thereof the two companies had at one and the same time published notices in the newspapers of the City of Peoria in words and figures identical, of an advance in the price of gas, and that an agreement or understanding exists between said corporations that they will not compete in price for the sale of gas and that the price therefor shall be determined mutually between them, by which arrangement and agreement all competition and reduction of prices was precluded, and that said ordinance fixing the maximum rate of charge was adopted in good faith to protect the said City and its

inhabitants from the oppression and illegal combination of complainant and the Peoria Gas Light and Coke Company.

A general replication was filed to this answer and a preliminary injunction issued restraining the City from the enforcement of the ordinance during the pendency of the cause.

On the 20th of May, 1901, the cause was referred to Mr. I. C. Pinkney, as a Special Commissioner, to take the proofs in the cause and report the same with his findings and conclusions therein with all convenient speed.

The Special Commissioner took the proofs of the respective parties and reported the same together with his conclusions both of law and fact. He found in brief that while the stockholders made representations as to the reduction of the price of gas upon which the complainant company procured the adoption of its ordinance, yet that the corporation complainant had not authorized the making of any such statements and therefore was not prejudiced by them. He found likewise that the City had authority under its police power to pass an ordinance regulating the price of gas, but he also found with much detail as to the evidentiary matter that the rate fixed by the ordinance of September, 1900, was less than the complainant company could afford to manufacture and distribute gas for and that the ordinance was therefore unreasonable and void. He wholly omitted and neglected to find anything in regard to the alleged unlawful combination between the two old companies, alleged to have been entered into in July, 1900, in violation of the Anti-Trust Act of Illinois, enacted in 1891.

Exceptions were taken and filed by both parties to the report of the Master, covering in minute detail every fact alluded to or mentioned by the Master. The case was heard before the Circuit Court on the report of the Master and the exceptions thereto.

Judge Humphrey, in deciding the case, February 8th, 1904, delivered the following opinion:

"This matter comes up on exceptions to the Master's "report. I believe both complainant and defendant have "filed exceptions to certain affirmative holdings of the "Master, and both parties have also filed exceptions because "the Master failed to hold—omitted to hold—upon certain "other questions. Without undertaking to remember or "specify the facts about this long list of exceptions, this "record shows that complainants' bill was filed on Septem-"ber 18, 1900, seeking to enjoin the enforcement of an "ordinance of the City of Peoria fixing the maximum rate "for gas, which ordinance had been passed on the 4th day "of the same month—September, 1900.

"The bill avers that the City Council had no power to "pass the ordinance, that the rate as fixed by the ordinance "is unreasonably low, that its enforcement would deprive "the complainant of its property without due process of "law, and would deny to complainant the equal protection "of the laws, thus raising a Federal question on the four-"teenth amendment to the Constitution of the United "States. The answer of the City avers that the complain-"ant has entered into an illegal combination or understand-"ing with the old gas company; second, that whether that

"be so or not, the complainant is estopped to deny the "validity of this ordinance or the reasonableness of this "rate by certain acts of its own at the time this franchise "ordinance was passed; third, that the City Council had "power to pass the ordinance in question; and fourth, that "the rate fixed was a reasonable one.

"I am of the opinion that the averment of the answer "which I have first mentioned has been so fully proven by "this record that it must be conclusive of the case. The "Illinois Anti-Trust Law, as construed by the Supreme "Court of Illinois, leaves no doubt in my mind that this "record shows, on the part of this complainant, a violation "of that act in the manipulation of the stock of both com-"panies, the use of the mains of both companies, the per-"forming by complainant's servants of the business of both "companies, the simultaneous agreement of rates between "the officers of both companies on the contract in evidence "between the two companies—all lead to the inevitable "conclusion that there was an understanding between com-"plainant and the old company such as the Illinois act "prohibits. A Court of equity will not assist complainant "to reap the fruits of such unlawful combination. The "exceptions on the part of the City to that part of the "Master's report which omits to find in accordance with "this view, will be sustained, and I need not enlarge upon "the other numerous questions raised by this record. The "bill will be dismissed at complainant's costs. Counsel for "the City may prepare the order." (Rec. p. 139.)

In accordance with the views expressed by the Court, a decree was entered reciting that the cause having come

on for a hearing on the bill of complaint, the answer of the defendant, the replication thereto, and the report of the Master therein and the exceptions thereto and the evidence reported by said Special Master, and the Court having heard the arguments of Counsel, and being fully advised in the premises, finds from the evidence taken and reported in said cause, that the complainant unlawfully entered into a combination, agreement or understanding with the Peoria Gas Light and Coke Company (another corporation organized and doing business under the laws of the State of Illinois, and engaged in the business of furnishing gas to the citizens of the defendant, the City of Peoria, in competition with the said complainant) to regulate or fix the price at which gas should be furnished the people and citizens of the defendant, the City of Peoria, by the complainant and the said Peoria Gas Light and Coke Company contrary to and in violation of the Statute of the State of Illinois, approved June 11th, 1891, and in force July 1st, 1891, and that the complainant is, therefore, without equity, and that the injunction theretofore issued in the cause should be dissolved.

It was therefore ordered, adjudged and decreed by the Court that the injunction theretofore issued in this cause be and the same was thereby dissolved and that the complainant's bill of complaint be and the same was thereby dismissed for want of equity and that complainant pay the costs of the suit to be taxed, etc. (Rec. 141-143.)

From this decree an appeal has been taken and this cause brought to this Court.

Our contention is that the Court below was right in

his opinion and decree finding that the complainant had entered into an unlawful combination with the Peoria Gas Light and Coke Company to regulate or fix the price of gas and that the bill was filed against the City of Peoria in aid of this unlawful combination and to enable it to reap the fruits of its unlawful conduct; that a court of equity will not extend its aid to accomplish such an end and that the bill was therefore properly dismissed for want of equity; that the City had the power and authority to pass the ordinance fixing the rate to be charged, subject only to the condition that such rate must be reasonable; that the Court below not having passed on this question but having disposed of the case on another question, this Court is not called upon to determine whether the rate fixed is reasonable or not, because if the finding of the Court below is affirmed it is unnecessary to determine whether the rate was reasonable or not and if this Court should reverse the Court below, it would not examine the voluminous testimony on the question of the rate being reasonable until it had been first examined and passed upon by the trial Court. And, further, that in the event this Court should examine the record as to this question, that the evidence is sufficient to show that the rate fixed is a reasonable one.

BRIEF.

I.

The Unlawful Combination.

The opinion of the trial Court and the decree herein disclose the fact that this case was determined solely upon the finding that the evidence showed that complainant and the Peoria Gas Light and Coke Company had entered into a combination or understanding to regulate and fix the price of gas to consumers in the City of Peoria in violation of the Anti-Trust Act of Illinois, passed in 1891.

This Act is as follows:

"AN ACT to provide for the punishment of persons, "co-partnerships or corporations forming pools, trusts and "combines, and mode of procedure and rules of evidence in "such cases. (Approved June 11th, 1891. In force July "1st, 1891, p. 206.)

"Pools, Trusts and Combines described. Sec. 1. Be "it enacted by the People of the State of Illinois, repre- "sented in the General Assembly, If any corporation organ- "ized under the laws of this or any other State or country, "for transacting or conducting any kind of business in this "State, or any partnership or individual or other associa- "tion of persons whosoever, shall create, enter into, become "a member of or a party to any pool, trust, agreement, "combination, confederation or understanding with any

"other corporation, partnership, individual, or any other "person, or association of persons, to regulate or fix the "price of any article of merchandise or commodity, or shall "enter into, become a member of or a party to any pool, "agreement, contract, combination or confederation to fix or "limit the amount or quantity of any article, commodity or "merchandise to be manufactured, mined, produced or sold "in this State, such corporation, partnership or individual "or other association of persons shall be deemed and "adjudged guilty of a conspiracy to defraud, and be subject "to indictment and punishment as provided in this Act.

"2. Organization or combination and issue of trust "certificates prohibited. Art. 2. It shall not be lawful for "any corporation to issue or to own trust certificates, or for "any corporation, agent, officer or employes, or the directors "or stockholders of any corporation to enter into any com- "bination, contract or agreement with any person or per- "sons, corporation or corporations, or with any stockholder "or director thereof, the purpose and effect of which com- "bination, contract or agreement shall be to place the man- "agement or control of such combination or combinations, "or the manufactured product thereof, in the hands of any "trustee or trustees, with the intent to limit or fix the price "or lessen the production and sale of any article of com- "merce, use or consumption, or to prevent, restrict or "diminish the manufacture or output of any such article.

"3. Violations of Act—Penalty. Art. 3. If a cor- "poration or a company, firm or association shall be found "guilty of a violation of this Act, it shall be punished by a "fine in any sum not less than five hundred dollars ($500)

"nor more than two thousand dollars ($2,000) for the first "offense, and for the second offense not less than two "thousand dollars ($2,000) nor more than five thousand "dollars ($5,000), and for the third offense not less than "five thousand dollars ($5,000) nor more than ten thous-"and dollars ($10,000), and for every subsequent offense "and conviction thereof, shall be liable to a fine of fifteen "thousand dollars ($15,000); provided, that in all cases "under this Act either party shall have the right of trial by "jury.

"4. Officer, agent or receiver of corporation, indi-"vidual, etc., violating act. Art. 4. Any president, man-"ager, director or other officer or agent or receiver of any "corporation, company, firm or association, or any member "of any company, firm or association, or any individual "found guilty of a violation of the first section of this Act, "may be punished by a fine of not less than two hundred "dollars ($200), nor to exceed one thousand dollars "($1,000), or be punished by confinement in the county "jail not to exceed one year, or both, in the discretion of "the Court before which such conviction may be had.

"5. Contracts, etc., violative of Act, void. Art. 5. "Any contract or agreement in violation of any provision "of the preceding sections of this Act shall be absolutely "void.

"6. Purchasers of product or manufacture violating "Act discharged from payment. Art. 6. Any purchaser "of any article or commodity from any individual, company "or corporation transacting business contrary to any pro-

"vision of the preceding sections of this Act shall not be "liable for the price or payment of such article or com- "modity, and may plead this Act as a defense to any suit "for such price or payment.

"7. Fines, recovery. Art. 7. The fines hereinbefore "provided for may be recovered in an action of debt, in the "name of the people of the State of Illinois. If, upon the "trial of any cause instituted under this Act to recover the "penalties as provided for in Section 3, the jury shall find "for the people, and that the defendant has been before "convicted of a violation of the provisions of this Act, they "shall return such finding with their verdict, stating the "number of times they find defendant so convicted, and "shall assess and return with their verdict the amount of "the fine to be imposed upon the defendant in accordance "with said Section 3; provided, that in all cases under the "provisions of this Act, a preponderance of evidence in "favor of the people shall be sufficient to authorize a verdict "and judgment for the people."

The foregoing Act is not to be confused with the Act of 1893, which by reason of provisions therein contained was held by this Court in *Connolly* vs. *Union Sewer Pipe Co.*, 184 U. S., 540, to constitute class legislation and to render the Act void.

Nor can the Act of 1891 above set out be said to be affected by the Act of 1893, because the Act of 1893 did not contain any provision expressly repealing the Act of 1891; and the Act of 1893 being void cannot be said to repeal the Act of 1891 by implication.

An amendment to the Act of 1891 was passed in 1897, the provisions of which were open to the same objection as the Act of 1893, namely, that it constituted class legislation. This amendment of 1897 is like the Act of 1893 void and can have no effect upon the original Act of 1891.

The Supreme Court of Illinois has lately passed upon these questions as follows:

"It is urged that the Act of 1891 is rendered uncon-"stitutional by the amendment of 1897, and it is also said "that the Act of 1891 was repealed by an Act entitled "An "Act to define trusts and conspiracies against trade, declar-"ing contracts in violation of the provisions of this Act "void, and making certain acts in violation thereof misde-"meanors, and prescribing the punishment therefor and "matters connected therewith"; approved June 20, 1893. "(Laws of 1893, p. 182.) "The questions here raised are "somewhat akin to each other and will be considered to-"gether.

"The Act of 1893 did not expressly repeal the Act of "1891, and from a comparison of the provisions of the acts "we are of the opinion that there is no such repugnancy "existing between the two that the latter would effect a re-"peal, by implication, of the former. Furthermore, the "Legislature evidently did not intend to repeal the Act of "1891 by the Act of 1893, as upon the day upon which the "latter Act was passed the former was amended, and the "Act of 1891 was again amended in 1897. In the case of "*Connolly* vs. *Union Sewer Pipe Co.*, *supra*, the Supreme "Court of the United States had before it for consideration "the Act of 1893, and it was there held that the entire Act

"was unconstitutional and void, as being in conflict with "the provisions of the fourteenth amendment of the Con- "stitution of the United States, in this: that it improperly "discriminated in favor of agricultural products or live "stock in the hands of the producer or raiser. If the Act "of 1893 is void as being in conflict with the Federal Con- "stitution, as it, in view of the decision in *Connolly* vs. "*Union Sewer Pipe Co., supra*, must be held to be, it seems "too plain for argument that it could not have worked the "repeal of the Act of 1891. *Raymond* vs. *Hartford Fire* "*Insurance Co.*, 196 Ill., 329-344.

"The amendment of 1897 to the Act of 1891 was in "the form of a proviso to Section 1 of that Act and reads "as follows: "Provided, however, that in the mining, "manufacture or production of articles of merchandise, the "cost of which is mainly made up of wages, it shall not be "unlawful for persons, firms or corporations doing business "in this State to enter into joint arrangements of any sort, "the principal object or effect of which is to maintain or "increase wages." Under the decision in the Connolly case "it is clear that this amendment is unconstitutional and "void, as being an unlawful discrimination in favor of the "persons sought to be exempted by the amendment from "the operation of the Act of 1891, as amended by the Act "of 1893. If the amendment of 1897 sought to be incor- "porated into said statute is void, it necessarily would make "no change in the original Act, and that Act would stand, "as amended by the Act of 1893, as the legislative will. "The discrimination contained in the Act of 1893, and that "sought to be incorporated into the Act of 1891, as amended "in 1893, by the amendment of 1897, are of the same

"character, and both are obnoxious to the fourteenth "amendment to the Constitution of the United States. The "obnoxious provision in the Act of 1893 carried down with "it the entire Act, as the Court held the obnoxious pro- "vision was so intimately connected with the subject matter "of the Act that it could not be separated from the body of "the Act without destroying the entire Act. Such conse- "quence, however, does not follow the failure of the amend- "ment of 1897. The Act of 1891, as amended by the Act "of 1893, was a valid statute. That Act, as amended, and "the Act of 1897, are separate and distinct acts, passed by "different legislatures, and the subsequent unconstitutional "Act, which is without force, can have no effect to over- "throw and render void the legal and constitutional ex- "pression of the legislature as manifested by the Act of "1891, as amended in 1893.

"It is suggested the constitutional method of passing "amendments in this State, which requires "the section "amended shall be inserted at length in the new Act," "requires a holding to the effect that the section sought to "be amended is necessarily repealed, even though the sub- "ject matter sought to be incorporated into the section fails "by reason of the fact that the amendment is unconstitu- "tional and void. We cannot agree with this view. The "amendment of 1897 does not, in terms, repeal Section 1 "of the statute of 1891. If any part of the Act of 1891 is "repealed it must be a repeal by implication and because "the amendment is in conflict with the original Act or a "part thereof. But the amendment is unconstitutional and "void. It therefore repealed no part of the Act upon which "it was fruitlessly sought to be engrafted as an amendment.

"(*Ex parte Davis*, 21 Fed. Rep., 396.) Repeals by impli-"cation are not favored (*People* vs. *Nelson*, 156 Ill., 364), "and in *Childs* vs. *Shower*, 18 Iowa, 261, it is said (p. "272): If the repealing clause was positive and uncondi-"tional and under circumstances which indicated a design "to repeal the old law at all events, it would doubtless be "operative, though contained in a statute which was uncon-"stitutional. So, on the other hand, it seems clear that an "unconstitutional enactment would not repeal, by mere "implication, a former law."

"We therefore, conclude, both the Act of 1893 and the "amendment of 1897 being unconstitutional and void, they "do not repeal, by implication, the Act of 1891, or any part "thereof, as amended in 1893.

The People vs. *Butler Str. Foundry*, 201 Ill., 236-257.

Chicago, Wilmington and Vermilion Coal Co. vs. *The People*, 214 Ill., 421-454.

The constitutionality of the Act of 1891 has likewise been affirmed and its provisions applied and enforced in the following cases:

Ford vs. *Chicago Milk Shippers Co.*, 155 Ill., 166.

Harding vs. *American Glucose Co.*, 182 Ill., 557.

C. W. & V. Coal Co. vs. *The People*, 214 Ill., 421.

The purpose and object of forming the complainant Company and granting it the privilege of erecting factories

and entering upon the streets of Peoria for laying pipes was to obtain competition and a reduction of the price in the furnishing of gas.

(Rec. pp. 794, 828, 898, 1082, 1093, 1116, 1042, 1049, 1057, 1065, 1071.)

The complainant did enter the same field and the same territory in the City of Peoria and became a competitor with the Peoria Gas Light and Coke Company in furnishing gas to the citizens of Peoria. (Rec. pp. 1328-1343.) Mr. Little, the General Manager, saying in a general way, "Our piping system competes with that of the Peoria Gas Light and Coke Company." (Rec. p. 1337.)

The old Company had reduced its price to one dollar at the taking out of the charter by the new Company, the result of threatened competition, and had operated under this rate of charge until the new Company commenced March 11th, 1900.

When the complainant commenced operations on March 11th, 1900, and fixed its charges at 95 cents for light and 65 cents for fuel gas, the old Company as a result of the actual competition reduced its charges to 50 cents.

Thereupon as a further result of actual competition the new Company reduced its charges for both light and fuel to 30 cents and the old Company met this price.

This condition of things continued until July, 1900. Then the two companies sought a way out of the competition which they had entered upon.

Walsh owned practically all the stock of complainant and controlled its management. Walton, the Treasurer, and Little were his confidential men.

Little had been sent to Peoria by Walsh for the express purpose of assuming the active management of the complainant Company for him.

The Coffey's, Farrelly, Robison, and Henebery, the stockholders, and operators of the old Gas Company, had parted with their holdings, selling their stock, in April, 1900, for over 400 per cent. of its face value. William McKinley, of Champaign, had become the President and dictator of the policy of the old Company. Macomber, its Treasurer, lived in Maine.

Mr. Little narrates the circumstances leading to and resulting in a combination of the two Companies on prices. He says, on July 31st, 1900, we made a change to gross rate $1.25 for light, 85 cents for fuel, 10 cents off if paid before the 10th day of the month. The old Company made the same rate at the same time.

The question was asked him, "What if any conferences were there between the officers of your Company and the officers of the old Company or any representation of the two Companies with reference to the advance in the rates on or about July 31st, 1900?"

He said, "We had a conference in Chicago. I was in Chicago and had a talk in the office of either the Chicago National Bank Building or the Equitable Trust Company." (Rec. p. 1350.)

I went over there and talked with Mr. Walsh, and I think Mr. McKinley, President of the old Company, was there.

When I came in the statement was made that the time had about come to stop carrying on an unprofitable business and the question arose as to what was fair and equitable rates; what we thought ought to be charged and the discussion was entirely on these lines. Mr. McKinley had had experience and been identified with a number of gas plants for several years. I don't remember who suggested the rate, whether I or Mr. McKinley. The general talk was on the advisability of making those rates and I don't remember who suggested the rates that were adopted. (Rec. pp. 1349-1358.)

Immediately following this interview or conference in Chicago the two Companies caused identical notices of the advance in the prices to be published in the newspapers of Peoria, as follows:

Gas for fuel, 75 cents net. Gas bills falling due September 1, will be rendered at the following rates:

For gas used for light $1.25 per thousand cubic feet.

For gas used for fuel, registered through a separate meter, 85 cents per thousand cubic feet.

Gas for fuel, 75 cents net. Gas bills falling due September 1, will be rendered at the following rates:

For gas used for light $1.25 per thousand cubic feet.

For gas used for fuel, registered through a separate meter, 85 cents per thousand cubic feet.

A discount of 10 cents per thousand cubic feet will be allowed on all bills paid before September 10, making the net rates:
Lighting gas, $1.15;
Fuel gas, 75 cents.

Customers now using gas for light and fuel, where only one meter is set on the premises, will please call at the office of the Company, and arrange for an additional meter.

PEORIA GAS LIGHT & COKE COMPANY,
127 N. Jefferson Avenue.

A discount of 10 cents per thousand cubic feet will be allowed on all bills paid before September 10, making the net rates:
Lighting gas, $1.15;
Fuel gas, 75 cents.

Customers now using gas for light and fuel, where only one meter is set on the premises, will please call at the office of the Company, and arrange for an additional meter.

PEORIA GAS & ELECTRIC COMPANY,
420 Main Street.

(Rec. p. 26.)

He says that the foregoing notices as set out in defendant's answer are correct and that they were published at the time in the papers.

He claims that the rate so far as the complainant was concerned was determined toward evening of the day of the Chicago conference, but pretends he does not know when the old Company arrived at the same conclusion. But there seems to have been a further conference at which Walton was present, for Little says that prior to the time he advanced complainant's rates he knew the Peoria Gas Light and Coke Co. was to make an advance; that this information came to him from Mr. Walton (Rec. p. 1350);

that he had talked the matter over with Mr. Miller and Mr. Clarke and the conclusion as to their price was fixed at that time; and that there was an understanding that the Peoria Gas Light and Coke Co. would increase its rates.

It appears therefore that there was a conference between the officers of these two companies in Chicago for the express purpose of agreeing or combining upon a rate.

It appears that the question was fully talked over and that either Little or McKinley suggested the rate.

It appears also that before Little put the rate in force, he knew the old Company was to advance its rate and that there was in fact an understanding that the old Company would advance its rate.

While Little had gone home from the conference in the evening and Walton and Walsh remained with McKinley, who represented the old Company, and no doubt the final determination of the rate was made, and then Little obtained his definite information from Walton, as he said he did, that the old Company was going to advance the rate also.

This rate could only have been the one suggested in the conference at Chicago and set forth in the published notices.

The advertisement or notice of this advance in rates, coming at the same time to the same papers, in the same words and punctuation, was no mere coincidence but conclusive evidence of the complete understanding and arrangement between the two companies to regulate and fix the price of gas.

This is as strong as circumstances are ever found to establish an unlawful combination short of a written contract.

Friendly and intimate relations from this time on existed between these companies, strongly indicative of the understanding which Little says had been arrived at between them as to prices.

The complainant Company soon commenced furnishing gas to some service pipes of the old Company on South Adams street in the city. Soon an exchange of communication took place between them by which the new Company agreed to furnish to the old Company from its factory all the gas the old Company required for its 4,500 or 5,000 customers at 75 cents per thousand. (Exh. 32, Rec. p. 1466).

Both companies however continued the mutual rate to their general customers.

Robb, the superintendent of distribution for the complainant Company and complainant's employees under him, thereafter looked after the mains, service pipes and meters of the old Company and made repairs thereon and received his orders in regard thereto from officers of the old Company, but received pay therefor only from the new Company.

Robb's Testimony, Rec. pp. 646-1378 to 1381.

The old Company, after the execution of the contract (Exh. 32), ceased to manufacture gas, although much of its plant had been rebuilt but a few months before.

McKinley made Eustice, the superintendent of manufacturing for the complainant Company, custodian of the manufacturing plant of the old Company and also directed him to tear down the retorts and sell them the best he could, leaving that entirely to Eustice. He received no pay from the old Company.

The execution of this contract (Exh. 32) was a mere afterthought. While the communication from the old Company to the new, asking for such an arrangement, was dated October 2nd, 1900, and the contract is said to have been entered into October 21st, 1900, they had their understanding long before that, for Robb says (Rec. pp. 1203-1204), that he had charge of the work, and under the direction of Mr. Little, in September, 1901, put in the main, 16 inches in size, 800 or 900 feet long, from the purifiers of the complainant Company to the station meter of the old Company for the purpose of delivering gas to the Peoria Gas Light and Coke Company.

The old Company was not going out of business. On the contrary, it continued to exercise its franchise and distribute gas to its customers and maintained its corporate organization in full force.

But it went out of the manufacturing business and became dependent on the complainant Company for its gas. This it would not and could not have done if there had not been an understanding and combination between these companies as to the price which should be charged the consumer.

It is true there was a provision in the contract by

which it could be terminated on six months' notice during the first two years of the ten years it had to run and that complainant claims it was terminated in 1902 and no more gas furnished under it.

But this was only after it became apparent the question of an unlawful combination was likely to embarrass the complainant. The two companies being operated under a common understanding, it was easy to procure the cancellation of it.

The old Company must still take its gas from the new Company, for it had directed Eustice to dismantle and sell its retorts. It had been reduced to such a condition that it would have to be rebuilt to manufacture gas. (Rec. pp. 1177-1178.)

It is to be noted also that there is no pretense of any change in the understanding as to rates at which both companies continued to furnish gas to their customers.

The foregoing facts and circumstances establish our contention that the complainant Company was guilty of entering into an unlawful combination or understanding with the old Company in violation of the Act of 1891, within the following rules:

"It makes no difference that the agreement for the "illegal combination is not a formal written agreement. It "may be a verbal agreement or understanding, or scheme "not embodied in writing but evidenced by the action of the "parties."

Harding vs. *American Glucose Co.*, 182 Ill., 617.

"A mere tacit understanding to work a common pur-"pose is all that is essential to a guilty, actionable combina-"tion. Individual intent by two or more persons to do an "unlawful act, or do a lawful act by unlawful means, is the "first step in that regard. Next follows concurrence be-"tween such individuals, not concurrence of action merely, "but concurrence of mental intent to effect the common "purpose, each to aid the others in that regard.

"Mutuality in the undertaking may be secured without "any express agreement and without a spoken or written "word between the conspirators or a meeting of the mem-"bers of the combine, or their even all knowing each other, "or the precise things to be accomplished or plans for its "accomplishment either in a general way or in detail, being "distinctly stated by any member of the combine to any "other member. If there is a meeting of minds, brought "about in any way to accomplish the common purpose, the "essentials of a guilty combination are all satisfied."

C. W. & V. Coal Co. vs. *The People*, 214 Ill., 453.

Patnode vs. *Westenhaver*, 114 Wis., 460.

"It does not matter that the understanding did not "amount to an absolute monopoly.

C. W. & V. Coal Co. vs. *The People*, 214 Ill., 452.

United States vs. *Knight*, 156 U. S., 1.

But further, while "The corporation as an entity may "not be able to create a trust or combination with itself, its "individual shareholders may, in controlling it, together

"with it, create such a trust or combination as will consti-
"tute it with them, alike guilty of an unlawful combina-
"tion."

Ford vs. *Chicago Milk Shippers Asso'n*, 155 Ill., 166-180.

Taking into view the way in which the complainant Company was formed and its stock manipulated; the fact that Miller and Clarke were mere adjuncts to Walsh in promoting the enterprise; that Walsh's name and connection was kept secret from all other subscribers until an ordinance and consent was obtained from the City; that the Peoria people were induced to become subscribers and directors for the purpose of obtaining more favorable action by the City; that the subscription of these Peoria people were obtained through erroneous impressions created by the promoters as to what the Company would do; that as soon as the privilege or grant was obtained from the City, Clarke assigned the bulk of the stock to Walsh; that it was understood, as Clarke says, among the promoters from the first that the Peoria parties could have one-third the stock and Walsh would take the rest. (Rec. pp. 1009-1010.) That no bona fide assessment was ever made on the stockholders for money to carry out the enterprise; that the only assessment ever made of 20 per cent. was repaid the subscribers with interest. (Rec. pp. 1405-1408-1409.)

That the plant in fact was built at an expense of $434,000 without resort to the capital stock for the means so to do; that Walsh was the capitalist of the promoters and already experienced in and connected with the organization of gas plants and business (Rec. pp. 1004-1005).

That as soon as operations commenced the Peoria directors were asked to step aside and Walsh, and Little and Walton, his personal confidants, were installed in their places. (Rec. pp. 1012-1017.) That the stock of all these parties was placed in the control of Clarke and Walsh as managers under a trust agreement, held by the Equitable Trust Company; that this was in pursuance of an understanding between the promoters when Walsh became interested, that the stock would be held as a unit and a continuity of management preserved during a period of years. (Rec. pp. 1405-1261.) That thus Clarke and Walsh secured the sole management of the gas business of this Company for a period of years; that thereafter no stockholders' meeting had been held; that the directors of the Company were not consulted about the business of the Company and only performed formal acts; it is a legitimate inference that a trust arrangement existed between the complainant Company itself and these two managers, Clarke and Walsh, who have by the trust agreement, a continuity of management of this gas business for a period of years to the exclusion of the Company itself by its board of directors; all tending to an unlawful combination to regulate and fix prices and create a monopoly in the gas business in violation of the Act of 1891.

Ford vs. *Chicago Milk Shippers Co.*, 155 Ill., 166.

In so far as the understanding and agreement between the two companies tends to restrain or prevent one of them from discharging its full duty to the public in the manufacture and distribution of gas, even if the restraint is but partial, and makes the one Company dependent on the

other for its supply of gas and enables them thus to maintain one uniform rate or price for both companies, it is against public policy and a violation of the statute, and unlawful.

"In the instance of business of this character it "presumably cannot be restrained to any extent whatever "without prejudice to the public interest al Courts decline "to enforce or sustain contracts imposing such restraint, "however partial, because in contravention of public policy."

Gibbs vs. *Baltimore Gas Co.*, 130 U. S., 396, 408, 409, 410.

The foregoing authorities show the construction placed by the Supreme Court of Illinois upon the Anti-Trust Act of 1891 in question. The cases of *Ford* vs. *Chicago Milk Shipper's Co.; Harding* vs. *American Glucose Co.*, and *Chicago, Wilmington & Vermillion Coal Co.* vs. *The People*, each involved a charge of violation of this statute and are directly in point.

From a consideration therefore of the foregoing facts as they appear of record, and the construction of the statute in question as above indicated, we submit that the trial Court was fully justified in his opinion when he said, "The "Illinois Anti-Trust Law, as construed by the Supreme "Court of Illinois, leaves no doubt in my mind that this "record shows, on the part of this complainant, a violation "of that Act in the manipulation of the stock of both com- "panies, the use of the mains of both companies; the per- "forming by complainant's servants of the business of both "companies; the simultaneous agreement of rates between

"officers of both companies, and the contract in evidence "between the two companies—all lead to the inevitable "conclusion that there was an understanding between com- "plainant and the old Company such as the Illinois Act "prohibits."

II.

This brings us to the final conclusion of the trial Court, that a Court of Justice "will not aid the complainant to reap the fruits of such unlawful combination."

The rates of the old Company of $1.00 and $1.25 had enabled it to maintain a surplus of $80,000 in April, 1900, and maintained the stock of $50.00 per share at the price of $218.35, which was actually received for it.

There was one thing in the way of restoring those rates and magnificent profits and that was the competition between the two companies. This competition was highly beneficial to the public, its maintenance for the common good. The public and the City had a direct interest therein.

If competition was removed, then the City had the right and power as shown above, for the common good and general welfare, to limit the charge to a reasonable rate.

While this suit is not for the enforcement of any of the provisions of the unlawful understanding or combination between the two corporations, it is in aid thereof, and to enable the complainant to reap the fruits thereof. They were bound under the law to take into account not only the understanding at which they might arrive as to the rate to be charged, but also the authority and power of the City to limit that rate.

Having arrived at an understanding and combination between themselves as to the rate, unlawful as such conduct was, they might have reaped the reward of their combination and advance of rates had it not been for the interest that the public has in their business and the power and authority of the public through the City to enforce respect for that interest by an ordinance regulating such rates.

The complainant must therefore avoid the effect of the acts of the City in asserting its power to limit the rates, in order to get the benefits of its unlawful combination.

The suit therefore seeking to enjoin the city from enforcing its ordinance is directly in aid of the performance of the unlawful combination, understanding or agreement and to enable it to obtain the fruits of its unlawful conduct.

But this Court has said, following the language of the Supreme Court of Massachusetts, that the rule of law is of universal operation, that none shall, by the aid of a Court of justice, obtain the fruits of an unlawful bargain.

Gibbs vs. *Baltimore Gas Co.*, 130 U. S., 396-412.
Citing *Russell* vs. *DeGrand*, 15 Mass., 35-39.

It is a maxim of equity that a complainant must come with clean hands to invoke the aid of the Chancellor.

It is a shock to the conscience and our sense of justice and right that a party who has been guilty of entering into an arrangement or agreement with another in direct violation of a prohibitory, penal law should call upon a Court of equity to stay the hand that has the right, the power and

the duty to prevent it from reaping the benefits of its unlawful conduct.

The Gibbs case, *supra*, illustrates this position. In that case the illegal or unlawful combination or agreement was, as in this case, between two gas companies to regulate and fix the rates to customers. In that case, as in this, such combination was prohibited by statute. The action was at law, not on the illegal contract, or to enforce any of its provisions, but to recover compensation, by one who had merely negotiated and assisted in bringing about the unlawful combination.

He was not seeking to recover the immediate fruits of the unlawful bargain, but compensation from one of the parties for bringing it about, and it was held he could not, recover.

If a Court of law makes such an answer in that case, equally emphatic must be the answer of a Court of equity in the present case.

It is true that the appellant insists that the City of Peoria had no power or authority under the statutes of Illinois to regulate the price or charges at which appellant should furnish gas to consumers, and that therefore the City had no interest in or concern with the action of the two companies in fixing rates.

We insist however in the first place that the appellant is in no better position to ask relief on the ground that the City had no power to regulate the charges than it is on the ground that the rates prescribed are so low that the ordinance is unreasonable.

The attempt to stay the power of the City to enforce the ordinance, no matter on which ground, was to enable the appellant to reap the fruits of the unlawful combination with the old Company.

But if the power of the City to enact an ordinance regulating appellant's charges for gas furnished to consumers, is important in this connection, then we insist that the appellant is estopped, by bringing its action in the Federal Court, to claim that the State had not delegated its power to the City.

If the appellant contends that the ordinance is void for want of power under the State law to enact it, then it raises a question depending for its solution on the laws of Illinois and does not involve a federal question. In such case the Federal Court would be without jurisdiction.

Mayor, etc. of Savannah vs. *Holst*, 65 C. C. A., 449-450.

Peoples Gas Light & Coke Co. vs. *Chicago*, 114 Fed. Rep., 384.

Peoples Gas Light & Coke Co. vs. *Chicago*, 194 U. S., 1-14.

To maintain its standing in this Court, the appellant must abandon its contention that the City had no power under the State law to adopt an ordinance regulating its rates.

But in any event, the City of Peoria under the laws of Illinois, had power to regulate by ordinance the price at which gas should be furnished to consumers, subject only

to the rule that obtains as to all ordinances, viz: that such ordinance must be reasonable.

The ordinance granting to the appellant the privilege of constructing and operating gas works and laying gas mains and pipes in the streets and distributing gas, did not fix the rate of charges to consumers. Nothing was contained in it on this question. There was no contract whatever between the City and appellant as to the scale of charges.

The ordinance is as follows:—

"*Be it ordained by the City Council of the City of Peoria:*

"SECTION 1. Subject to the terms and conditions of "this ordinance, there is hereby granted to the Peoples Gas "and Electric Company, a corporation created and existing "under and by virtue of the laws of the State of Illinois, its "successors and assigns, the right to construct, repair, "maintain and operate gas works in the City of Peoria, to-"gether with the right of way along, upon and under all "the avenues, streets, alleys, highways, and public places in "said city, for the purpose of placing, operating, repairing "and maintaining one or more lines of gas mains and pipes "and all necessary feeders, service pipes, branches, cutoffs "and manholes in connection therewith, for the distribution "of natural or manufactured gas for light, fuel, heat and "power purposes.

"SECTION 2. That in pursuance to the petition of the "owners of the land representing more than one-half of the "frontage on the streets, avenues, and public highways

"hereinafter named, the right and authority, is hereby "granted to said Peoples Gas and Electric Company, its "successors and assigns, to construct, lay and maintain gas "mains, pipes, branches, feeders, service pipes, cutoffs, and "manholes, in and under and along the following named "streets, avenues, and highways in the said City of Peoria, "Illinois, for the purpose of furnishing the said City and "the inhabitants thereof with gas for light, fuel, heat and "power, viz:

(Here follows the names of the streets and avenues, etc.)

"Also the right and authority to connect the same "with mains, pipes, feeders and service pipes that may be "laid and maintained in and along any other streets, "avenues and highways in said City for the purpose afore-"said.

"SECTION 3. Provides that the complainant Company "shall enter into a bond of a thousand dollars to protect the "City and all persons or corperations, damaged or injured "by reason of negligence, etc.

"SECTION 4. Provides that the Ordinance is granted "on condition that the Company shall within six months "from date of acceptance begin the construction of gas "works and within eighteen months of acceptance begin the "manufacture and supply of gas.

"And also that within thirty days from the passage of "the Ordinance, they will deposit with the City Treasurer, "the sum of Five Thousand ($5,000.00) Dollars security

"for compliance with the provisions of this Section, to be "returned when the Company shall have expended Fifty "Thousand ($50,000.00) Dollars in the purchase of "property, etc.

"SECTION 5. Provides that the Company shall lay "mains, etc., when required, under certain conditions, by "the City.

"SECTION 6. Specifies the regulation and conditions "under which streets may be opened for the purpose of lay-"ing service pipes and mains.

"SECTION 7. The rights and privileges hereby granted "by this Ordinance are granted for a term of ninety-nine "(99) years from and after the acceptance of this Ordinance.

"SECTION 8. Provides that it shall take effect from "and after its passage. Passed April 18th, 1899. (Rec. "pp. 5 to 12.)

The Commissioner or Special Master to whom this case was referred, in his conclusion of law found and reported under the foregoing ordinance and the statute hereinafter set out, as follows:

"The City of Peoria (defendant) has the right under "the law of the State of Illinois to pass ordinances regulat-"ing the maximum price to be charged for gas furnished "by complainant to its citizens, subject, however, to the "well established principle that such ordinances must be "reasonable." (Rec. p. 57.)

To this finding of the Master, the complainant

excepted, but the Court below did not pass upon this exception unless it was inferentially involved in the finding and decree which was entered.

The business of the complainant is materially benefited by the franchise granted it by the State and the privileges granted it by the City. The business itself is of a *quasi* public character.

By entering upon this business under the powers and privileges granted the complainants, its property became "affected with a public interest, and ceased to be *juris privati* only."

The complainant having devoted its property and business to a use in which the public has an interest, it in effect has granted to the public an interest in that use and must submit to be controlled by the public for the common good.

Munn vs. *People of Illinois*, 94 U. S., 113.

Gibbs vs. *Baltimore Gas Co.*, 130 U. S., 396-408.

New Orleans Gas Co. vs. *Louisiana Light Co.*, 115 U. S., 650-659-660.

People vs. *The Chicago Gas Trust Co.*, 130 Ill., 268.

Chicago Gas Light & Coke Co. vs. *Peoples Gas Light & Coke Co.*, 121 Ill., 530.

City of Danville vs. *Danville Water Co.*, 178 Ill., 299.

State, ex rel., vs. *Gas Co.*, 34 Ohio State, 512.

Zanesville vs. *Gas Light Co.*, 47 Ohio St., 1.

The State of Illinois, by statute, has delegated its police power to regulate its rates to the City of Peoria.

The Statute of Illinois then and still in force in regard to the powers of the City Council, provide as follows:

"SECTION 1. The City Council in Cities, and Presi-"dent and Board of Trustees in Villages shall have the "following powers:

* * * * * *

"Thirteenth. To regulate the openings therein "(streets) for the laying of gas or water mains and pipes "and the building and repairing of sewer, tunnels and "drains and erecting gas lights; *provided*, however, that "any Company heretofore organized under the general laws "of this State or any association of persons organized or "which may be hereafter organized for the purpose of "manufacturing illuminating gas to supply cities or villages "or the inhabitants thereof with the same, shall have the "right by consent of the Common Council (subject to "existing rights) to erect gas factories and lay down pipes "in the streets or alleys of any city or village in this State, "subject to such regulations as any such city or village "may by Ordinance impose. * * * * *

"Sixty-sixth: To regulate the police of the City or "village, and pass and enforce all necessary police Ordi-"nances."

Revised Statute of Illinois, Chap. 24, Art. 5.

The statute above set forth under the authority of which the City was acting in granting the complainant the

privileges contained in the ordinance vests in the City the most comprehensive police power, making all such grants of privilege to corporations for the purpose of erecting factories and laying mains on the streets or alleys, "Subject to such regulations as any such City or village may by ordinance impose."

These regulations must be such as is for the "common good." They clearly refer to such control as the State might exercise under its police power and this power by this statute is delegated to the City. The power to regulate rates of charge is one of these police powers.

Munn vs. *People*, 94 U. S., *supra*.

New Orleans Gas Co. vs. *Louisiana Light Co.*, 115 U. S., 656-659-660.

Owensboro vs. *Owensboro Water Works Co.*, 191 U. S., 308.

This power to regulate rates is a governmental power continuing in its nature, which if it can be bargained away at all can only be by words of positive grant and if any reasonable doubt exists in regard thereto it must be resolved in favor of the existence of such power.

Owensboro vs. *Owensboro Water Works Co.*, 191 U. S., 308-370.

Boston Beer Co. vs. *Massachusetts*, 97 U. S., 25.

It is to be noted that the statute first provides that such companies as the complainant may erect gas factories and lay down pipes in streets and alleys with the *consent of the Common Council* and then adds further that such acts shall be "subject to such *regulations* as any such City may

by ordinance impose," thus showing that the matter of *regulation* was something different and additional to the *consent* of the City and is to be distinguished from conditions imposed as part of the consent.

This power to regulate, being a power of government, continuing in its nature, it follows that it may be exercised from time to time by succeeding Councils, as the exigencies of the case require.

Railroad Commission Cases, 116 U. S., 307-325.

Not only is this power to regulate a continuing one, but, the grant of this power to the City is as broad as the police power of the State to regulate. This Court in construing similar language, where it was contended that the reservation by statute, to the General Assembly of the power to prescribe in the government of corporations, "Such regulations and provisions as it may deem advisable" was not intended the power "to interfere with the internal business management of the corporation itself," held the construction contended for was too narrow. The question was whether this language is broad enough to cover the act of the Legislature authorizing cities to regulate charges for water service, and it was held that it was.

Freeport Water Co. vs. *Freeport City*, 180 U. S., 587-596.

THE POWER OF THE CITY TO PASS AN ORDINANCE REGULATING RATES MAY BE PREDICATED ALSO ON CLAUSE SIXTY-SIX ABOVE SET OUT WHICH VESTS GENERAL POLICE POWERS OF THE STATE IN THE CITY.

It is true Justice Grosscup in the case of *Mills* vs. *City of Chicago, et al.*, 127 Fed. Rep., 731, held that this clause was intended only to authorize the cities to organize a police force in the nature of a constabulary.

But he failed to note the construction put upon this clause by the Supreme Court of the State, although in a former opinion in the case of *Peoples Gas Light & Coke Co.* vs. *Chicago*, 114 Fed. Rep., 384, he held that this was a question of State law; and this being so the construction of this statute by the State Court should be followed:

In a case before the Supreme Court of Illinois the question was whether the city had authority to pass an ordinance prohibiting the keeping open of a place of business on Sunday.

The only authority for such an ordinance was the general grant of police power contained in this subdivision 66 of Sec. 62 of Article 5 of the City and Village Act which authorized cities to "regulate the police of the city or village "and enforce all necessary police ordinances."

The Court said, "It is insisted this clause only refers "to the organization and regulation of a police force. We "think this is a too narrow construction—that the clause is "not limited in its application to police officers; *but may*

"extend to and embrace a subject matter of police regula-
"tion under the general police power of the State."

McPherson vs. *Village of Chebanse*, 114 Ill., 46-49.

The same Court in a late case said, "Paragraph 66 "confers upon cities power to regulate the police of the city "or village and pass and enforce all necessary police ordi- "nances. We held in the case of *McPherson* vs. *Village* "*of Chebanse*, 114 Ill., 46, that the power conferred under "this clause is not limited in its application to the organiza- "tion and regulation of a police force, but it is extended to "embrace the subject matter of police regulation under the "general police power of the State."

City of Chicago vs. *Gunning System*, 214 Ill., 628-634-635.

This police power of the State is "that inherent or "plenary power which enables the State to prohibit all "things hurtful to the comfort, safety and welfare of society "and may be termed "the law of overruling necessity." "Anything which is hurtful to the public interest is subject "to the police power and may be restrained or prohibited "in the exercise of that power. All rights, whether tenable "or untenable, are held subject to this power.

Chicago vs. *Gunning System*, 214 Ill., 635.

It is under this same police power as shown by cases above cited that the State has the right to regulate the rates of charges of public service corporations. The case at bar pointedly illustrates the statement that it is "the law of overruling necessity," for the two gas companies made an

unlawful combination, which stifled and suppressed competition and left the City and its citizens subject to the exactions of an absolute monopoly.

There was certainly in this situation an "overruling necessity" which called for the exercise of that general police power vested in the City by virtue of clause 66.

But if any doubt remained as to the power of the City to adopt and enforce the ordinance in question from a consideration of clause 13 or 66 alone, such doubt will be removed by a consideration of the two together.

"An ordinance may derive its validity from several "different grants of power, and not depend solely upon any "single section or clause of a statute."

Gundling vs. *City of Chicago*, 176 Ill., 340-347.

Chicago vs. *Gunning System*, 214 Ill., 628.

It certainly would be no strained construction to hold that the general police power applied to all subjects with which the City was authorized to deal. It was clearly authorized to deal with the matter of distributing gas by gas companies. The exercise of the general police power mentioned in clause 66 with reference to this subject would certainly include fixing rates and charges of the Company in making such distribution.

We contend therefore that the City had the power and authority to regulate the rates of complainant. That the City had a direct interest in the rates which complainant sought to establish by its combination or understanding with the old gas Company; that complainant by its bill is

seeking the aid of a Court of equity to enable it to carry out and reap the fruits of an unlawful understanding or arrangement with the Peoria Gas Light & Coke Co. in a matter in which the City had a direct interest and authority to act; that the object of the bill is against the policy of the law and was properly dismissed for want of equity.

III.

Was the Ordinance Reasonable?

Whether the rate fixed by the ordinance complained of was a reasonable one or not is a question of fact and its determination was rendered immaterial to the decision of the case by the view the trial Court took on the question of unlawful combination.

If the finding and decision of the trial Court is correct and the bill was properly dismissed for want of equity because it was in aid of an unlawful combination and to enable complainant to reap the fruit of its unlawful conduct, the inquiry as to whether the rate fixed by the ordinance is reasonable or unreasonable is likewise immaterial in this Court.

If, however, this Court should find that the trial Court had erred in its finding and decree, still this Court would not, as we understand the practice here, enter upon an examination of the record as to the reasonableness or unreasonableness of the rate because this question was not examined and passed upon in the trial Court.

The findings of the Special Master and the exceptions thereto on this question were not disposed of.

The Court expressly limited his determination to a finding as to the unlawful combination and a dismissal of the cause on this ground and none other.

To determine the question of the reasonableness of

the rate now would require the examination by this Court of a voluminous record, going into extended detail of the methods of manufacture, the expenses of equipment and operation; the elements taken into consideration by the various expert witnesses in determining the cost of manufacture and distribution of gas and thus entail upon the Court, labor that must consume a great deal of time.

Before this Court is called upon to do this it is entitled to have these questions passed upon by the trial Court. This view was expressed by this Court in a case involving a determination of the reasonableness of the rate fixed by railroad commissioners, and again in a case where was involved the reasonableness of the rate of charge fixed by ordinance for furnishing water by a water company; in the latter case the Court saying:

"The other contention made by appellee is that the "rates fixed by the City are unreasonable. Upon this "contention we shall not pass. It depends upon many "questions of fact and of values to which the Circuit Court "gave no attention and on which it expressed no judgment. "It is better for a trial Court to determine such questions "in the first instance.

Owensboro vs. *Owensboro Water Works Co.*, 191 U. S., 358-372.

Chicago, Milwaukee, etc., Ry. vs. *Tompkins*, 176 U. S., 167-179.

For the foregoing reasons we shall suggest on this question only a few things appearing in the record, showing that the City was not acting recklessly and without due

regard to the rights of the complainant in fixing the rate complained of.

From the facts heretofore pointed out the promoters and those immediately connected with the Companies organization made such representation to the City Council and to some who became subscribers to the stock that the City was justified in inferring that the complainant could manufacture and sell gas at 75 cents per thousand cubic feet and realize a fair profit on the actual investment.

It is to be noted also as a strong circumstance that the old Company which had for several years been furnishing gas at $1.25 net for light and 75 cents for fuel, had been able to pay 10 per cent. dividends and accumulate a large surplus; that for one year before the complainant had commenced actual operations the old Company had reduced its price still further and were selling light and fuel at an average of 87½ cents at the time the complainants commenced actual operations, and at the time the old Companies' stockholders sold out in April, 1900, to McKinley and his associates the old Company had a surplus of $80,000 and its stock sold at a premium, bringing $218.00 for each $50.00 share.

If on rates averaging 87½ cents to $1.00 per thousand such a surplus could be accumulated and maintained and its stock in the face of actual competition maintained at such a high premium, it would seem to any fair-minded person that 75 cents per thousand would give a fair profit on the actual investment.

Furthermore, Mr. Henebery and Mr. Robison, each of

whom had been for many years stockholders and directors of the old Company and intimately connected with its business, testify that in their opinion gas could be manufactured and sold in Peoria at 75 cents per thousand at a fair profit.

These conclusions and deductions of Mr. Robison and Mr. Henebery were estimates based on the earnings of the old Company, and on the basis of its business transacted. Robison had been director and president for twenty years prior to 1898, and Henebery director and treasurer for twenty-five years prior to April, 1900.

Much weight should attach to the opinions of these two witnesses, especially in the light of what Little, the manager for the complainant, said. He testified, "the "treasurer has known more about the cost of manufacture "even than I did or the officers of the Company." (Rec. p. 1342.)

If people who are handling the business part of gas enterprises give the matter study and attention enough I do not see why they could not acquire a reasonable, definite and accurate knowledge pertaining to the cost of gas production and distribution and the profits connected with it."

Frederick Egner, who is a gas engineer, with extended experience in England and Germany, as well as this country, and who was intimately acquainted with the plant and business of the Peoria Gas Light and Coke Company, says that the cost of manufacturing gas in Peoria is not to exceed 30 cents per thousand. (Rec. p. 1493.)

Thomas Lyttalis, a general gas engineer, with experience in England, Canada, and this country, says gas can be manufactured in Peoria at 30 cents per thousand, and allowing for leakage, wear and tear, it can be produced for 47.75 cents per thousand. (Rec. pp. 1566-1579.)

In determining what is a reasonable rate the stockholders of the complainant are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. As said by this Court in another case, "It is alleged here that the rates prescribed "are unreasonable and unjust to the Company and its "stockholders but that involves an inquiry as to what is "reasonable and just for the public.

Covington & L. Turnpike R. Co. vs. *Sandford*, 164 U. S., 578.

Even though the business is divided between two companies so that each has fewer consumers and therefore less profits this does not of itself justify raising the rate above what would be profitable if one company alone had the entire business.

Covington & L. Turnpike Co. vs. *Sandford, supra.*

The City of Peoria was consuming from 150,000,000 to 165,000,000 cubic feet of gas per year.

The estimates and calculation of the witnesses for the complainant are based upon the sale by the complainant Company of only one-third of this total consumption or a little over 50,000,000 per year. It is also admitted that it is much more expensive per thousand to furnish only 50,000,000 than 150,000,000.

The basis therefore of the conclusions of complainant's witnesses is wrong and their conclusions upon which the Master based his report are wrong.

It is further to be borne in mind that, the data from which complainant deduces its conclusions as to what is the cost of production is taken from the period when complainant was inaugurating a new plant and its customers few and its business necessarily more expensive than when it would become thoroughly established. (Rec. pp. 383-384-339.) Furthermore that all this data was made after the filing of the bill and is practically evidence made to order for the purpose of supporting the bill in this case. This is enough to cast doubt on all its estimates of the cost of production.

From Exhibit "43" we may find the amount of gas sold by the complainant Company during the month of September, 1901, also the value of the residuals and the amount of the operating expenses and in this way the cost of gas.

The gas sold was		4,186,200 cu. ft.
Total expenditures per month as per vouchers, including proportionate share of taxes and insurance		$4,441.45
Residuals made—coke	$1,252.45	
Breeze	20.70	
Retort carbon	15.85	
Tar	302.55	
Ammonia	102.57	
Total		$1,694.12
Balance being net cost of gas sold		$2,747.33
Cost per thousand cubic feet		65 6-10 cents.

It appears from this same operating statement, Exhibit "43," that for the year after complainant commenced furnishing all the gas for both companies making its entire output 152,000,000 cubic feet per year, it was able to manufacture this gas at the cost of 45 6-10 cents per thousand.

This shows that it is 20 cents per thousand cheaper to manufacture the entire output for the City than only one-third thereof and the Master's finding is in error on this question.

Complainant's operating statement shows that the cost per thousand on an annual production of 51,178,300 cubic feet the cost per thousand at the consumers' meter was 77 9-10 cents, while it clearly appears from the same statement as indicated above that the cost when producing 152,000,000 is 46 5-10 cents. By this comparison it appears manufacturing the entire output by one plant and one company would be 32 3-10 cents cheaper.

Whether the rate is a reasonable one should be determined, as we contend, on the authority above cited, by the cost of production of the entire output by one management; that is by the method it could be done cheapest. This only would properly conserve the rights of the public.

We now call attention to the estimates of complainant's witnesses. In answer to a hypothetical question they respectively testified as to the cost of producing gas on the basis of the output being 50,000,000 per year, as follows:

J. H. Eustice	Rec. p. 383	$ .80
E. G. Cowdery	Rec. pp. 338-339	.83
E. G. Pratt	Rec. p. 408	.85
I. N. Knapp	Rec. p. 554	.87
K. N. Mitchell	Rec. p. 520	.89
L. Kellogg	Rec. p. 536	.90
D. McDonald	Rec. p. 621	1.01

In the above testimony as to the cost no consideration was taken of the residuals. But the record discloses that on a basis of manufacturing 51,198,300 cubic feet the value of the residuals were $20,373, or .39.7 cents per thousand.

Deducting the value and amount realized from the residuals per thousand cubic feet, that is .39.7 cents, from the cost given by the foregoing witnesses, and we have as the net cost of production for each witness the following:

J. H. Eustice	$ .40.3
E. G. Cowdery	.43.3
E. G. Pratt	.45.3
I. N. Knapp	.47.3
K. N. Mitchell	.50.3
L. G. Kellogg	.61.3
Harvey W. Brown	.66.3

The average of these, about 50 cents per thousand as the fair net cost, would leave 25 cents per thousand as the profits which was realized under the rate fixed by the ordinance in question.

If the manufacture of the entire output by one plant would make this net cost 20 cents less, it would make the net cost 30 cents, the price at which both Companies reduced it when their competition was at its height.

The above figures explain why the old Company which

had two-thirds of the entire output in the beginning was willing to make three to five-year contracts at 50 cents per thousand. It would afford them a profit even at this figure.

There are also many elements improperly taken into consideration by complainant in estimating the cost of the production of gas, such as expense of litigation in this case, and other matters; an excessive profit on the money invested, viz: 10 per cent.; the allowance for depreciation without taking into account the increase in value of the plant and its earning capacity with the growth of the city which largely exceeds the estimated depreciation.

We insist as above suggested that a careful analysis of the testimony will show that the rate fixed is a reasonable one. But understanding from the cases cited that this question will not now be examined by this Court, we refrain from making a complete analysis of the evidence on this subject; as it would make this brief needlessly long and prolix.

We respectfully submit that for the reasons above indicated the decree of the Court below should be affirmed.

WINSLOW EVANS,
Attorney for Appellee.

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[19,367]

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1905.

No. 33.

PEORIA GAS AND ELECTRIC COMPANY, *Appellant*,

vs.

CITY OF PEORIA.

Office Supreme Court U.
FILED
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JAMES H. McKENNEY,
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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

NOTICE OF PETITION FOR LEAVE TO FILE A BRIEF IN BEHALF OF DARIUS O. MILLS.

Notice is hereby given that the annexed petition for leave to file a brief in the above entitled cause on behalf of Darius O. Mills, petitioner, will be presented to the Supreme Court of the United States, in the City of Washington, on Monday, the 30th day of October, 1905, at the coming in of the court on that day or as soon thereafter as counsel can be heard.

New York, N., Y., October 23, 1905.

WILLIAM D. GUTHRIE,
52 William St., New York, N. Y.,
Counsel for Petitioner.

To

EDWARD C. RITSHER, Esq.,
152 Monroe St., Chicago, Ill.,
Counsel for Appellant.

WALTER H. KIRK, Esq.,
Masonic Temple, Peoria, Ill.,
WINSLOW EVANS, Esq.,
Peoria, Ill.,
Counsel for Appellee.

[19,367]

SUPREME COURT OF THE UNITED STATES,

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PEORIA GAS AND ELECTRIC COMPANY,
Appellant,

vs.

CITY OF PEORIA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

PETITION FOR LEAVE TO FILE A BRIEF ON BEHALF OF DARIUS O. MILLS.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Darius O. Mills, petitioner above named, who is not a party to the above entitled cause, but who, as party to another pending suit, has a large pecuniary interest in the question of the power of the city councils in the state of Illinois to fix by ordinance the price of gas furnished within the corporate limits of said cities, respectfully presents this his petition for leave to file a brief in the above entitled cause on said question of power, and, as grounds why his petition should be granted, respectfully shows to the court as follows:

That he is the complainant in another suit now pending in the Circuit Court of the United States for the northern district of Illinois, commenced July 6, 1903, wherein the city of Chicago and the People's Gas Light and Coke Company are defend-

ants, and wherein is involved the question of the power of the city council of the city of Chicago, under the laws of the state of Illinois, to fix the price of gas furnished within the corporate limits of the said city of Chicago, under an ordinance passed by the city council of said city on October 15, 1900, in all respects similar to the ordinance passed by the city council of the city of Peoria on September 4, 1900, under consideration in the case at bar.

That the power and authority of the city council of Peoria to pass said ordinance of September 4, 1900, is claimed by that city to have been conferred by section 1, article V of the City and Village Act of said state (1 Starr & C. Ann. Stat., 2d ed., pp. 689, 695, 707); and that the validity of the said ordinance of the city of Chicago is drawn in question in your petitioner's pending suit upon the ground that said statute does not confer any such power.

That in your petitioner's said suit against the city of Chicago and the People's Gas Light and Coke Company, now pending and undetermined, an injunction to restrain the city of Chicago from enforcing said ordinance because of its invalidity was granted by the Circuit Court of the United States for the northern district of Illinois, on the ground that no such power existed in the city council, and the court, by Grosscup, Circuit J., delivered an opinion holding such ordinance of the city of Chicago to be without authority and void, which will be found reported in 127 Fed. Rep. 731. The numerous authorities upon which such decision was based are cited in the brief presented herewith, which your petitioner is appre-

hensive may not otherwise be called to the attention of the court.

That the ordinance involved in your petitioner's said suit is the same ordinance considered by this court in the case of the *People's Gas Light and Coke Company* v. *City of Chicago*, 194 U. S. 1, in which case, although fully argued, the point of the power of the city council was not decided by the court because, among other things, it appeared that the bill in that suit had been dismissed without prejudice to another suit to test the question of power on the part of the city council of Chicago.

It is proper to add that since the commencement of your petitioner's suit the legislature of the state of Illinois, in 1905, has attempted to confer upon the city council of Chicago the express power to fix and regulate the price of gas, and that, in your petitioner's case as in the case at bar, no question is presented as to the validity of such subsequent legislation, the only point being that in September and October, 1900, no authority had been conferred by the legislature of the state of Illinois upon the city council of Chicago or the city council of Peoria to fix and regulate the price of gas.

All of which will more fully and at large appear in the proposed brief which is presented herewith.

NEW YORK, October 23, 1905.

DARIUS O. MILLS,
Petitioner.

WILLIAM D. GUTHRIE,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, } ss.:

DARIUS O. MILLS, being duly sworn, on oath says, that he is the petitioner named in and who has subscribed to the foregoing petition, that he has read the same, and that the matters therein stated are true.

DARIUS O. MILLS.

Subscribed and sworn to before me
this 23d day of October, 1905.

JOHN P. TUOMEY,
Notary Public,
Kings Co. N. Y.
Certificate filed in New York Co.